IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 192 of 1991

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

EMMERICH JAEGAR

Versus

COMMISSIONER OF INCOME-TAX

Appearance:

1. INCOME TAX REFERENCE No. 192 of 1991
MR JP SHAH with Mr.Manish J.Shah, for Assessee-applicant.
MR Pranav Raval for Mr. D.D.Vyas, Sr.Advocate
and Mrs.M.M.Bhatt for the Revenue.

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 25/11/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. The following two questions of law have been referred to the Court for opinion by the Income-tax Appellate Tribunal, Ahmedabad Bench 'A" under Section 256(1) of the Income Tax Act (the Act):

1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that retention remuneration received by the assessee in foreign currency from his foreign employer was liable to be included in the total income of the assessee?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the assessee was not entitled to relief under Article XIV of the Convention for the Avoidance of Double Taxation between India and Austria?

2. The assessee-applicant was a foreign technician under the employment of M/s. Vereinigte Osterreichische Eisen, a foreign Company. The assessee was deputed for rendering technical services/on-spot clarification to M/s. Gujarat State Fertisilizers Co.Ltd. (GSFC) under the terms of agreement between GSFC and M/s. Voest Alpine. As per the terms of appointment, the assessee was to be paid "retention remuneration" during the period of his stay in India and such payment was to be made in foreign currency by the foreign employer.

3. The assessee claimed that such retention remuneration received abroad would be outside the purview of the provisions of the Act, since the assessee was a non-resident. He relied upon the decision of Commissioner of Income-tax V. S.G. Pgnatale, 124 ITR 391 in support of his plea. Alternatively, it was contended that in view of Article XIV (2) of the Convention for Avoidance of Double Taxation between Government of India and Government of Austria, the retention remuneration was not liable to be taxed in India as the assessee had not been present in India for a period exceeding, in the aggregate, 183 days during the relevant previous year.

4. The Assessing Officer while framing the assessment on 27th March, 1986 negatived the plea on the basis of S.G. Pgnatale (Supra) decision in light of the Explanation inserted below Section 9(1) (ii) of the Act by Finance Act, 1983 with retrospective effect from 1st April, 1979. In relation to the alternative contention, the Assessing Officer observed that the assessee could get relief under Double Taxation Agreement on production of assessment order and proof for payment of tax. That since no proof was produced, the claim was not entertained. The assessee went in appeal before the Appellate Assistant Commissioner, Baroda, who for the reasons stated in his order dated 1st May, 1986 confirmed the assessment order by stating that no interference was called for.

5. The assessee along with the other similarly situated assessees preferred appeal before the Income=tax Appellate Tribunal. The Tribunal for the reasons stated in its consolidated order dated 28th May, 1980 upheld the orders of the authorities below. According to the Tribunal, all the conditions in sub-clause (2) of Article XIV of the Double Taxation Agreement had to be satisfied as the conditions were cumulative, and before this country gave up its right to tax the income earned in India, it had to be satisfied that the assessee was liable to pay tax in respect of that income in Austria.

6. Mr. J.P.Shah, the learned Advocate appearing on behalf of the assessee applicant contended that the Tribunal as well as the Income-tax authorities had committed an error in law in reading Article XIV with special reference to sub-clause (c) of Clause (2) of the said Article by insisting upon proof for payment of tax, despite the fact that any of the said sub-clauses did not stipulate any such requirement. It was submitted that under Clause (1) of the Article, tax liability in Austria should be presumed and only on that basis was it possible to read the said Article which provided for exemption under Clause (2). That out of the four conditions mentioned in Clause (2), according to the assessee, all the four conditions stood fulfilled, but according to the revenue, condition no.3 (vide sub-clause (c)) was not fulfilled. Mr. Shah, therefore, submitted that the dispute was thus only as regards interpreting the said sub-clauses, and if on reading of the said sub-clauses, the Court came to the conclusion that what was contended by the assessee was the correct reading of the Article, the assessee should succeed. According to him, when the language provided that "the profits or remuneration are subject to Austrian tax" the only requirement was as to

whether the assessee was liable to tax under the Austrian statute and the further requirement insisted upon by the authorities, to the effect that the assessee must have actually paid the tax, was not borne out from the said provision.

6.1 Mr. Shah in support of his submissions placed reliance on the two decisions of the Apex Court in the case of Union of India and Another V. Azadi Bachao Andolan and Another, 263 ITR 706 and Commissioner of Income-tax V. P.V.A.L. Kulandagan Chettiar, 267 ITR 654 in support of the submission that wherever there is conflict between provisions of the Act and the Double Taxation Agreement, the terms of the agreement would prevail over the provisions of the Act, and further that the agreement being in the nature of a document providing for relief against taxation, beneficial reading of the terms of the agreement was required.

7. As against that Mr. Pranav Raval for Mr.D.D.Vyas, Senior Advocate and Mrs. M.M.Bhatt appearing on behalf of the revenue submitted that the conditions prescribed under Clause 2 of Article XIV were cumulative in nature and even if any one condition was not fulfilled, the assessee could not be granted relief under the agreement. It was further submitted by the learned Counsel for the revenue that under sub-clause (c) of Clause (2) of Article XIV, what was provided for was that an assessee claiming relief from being taxed on the ground of the same income being taxed over again in his country would have to specifically show that the same income had been taxed in one country so as to exempt the same from the charge of tax in the other country. According to the learned Counsel, the authorities below had rightly called upon the assessee to furnish proof of payment of tax, and in absence of the same, the Tribunal had correctly upheld the orders of the authorities below. In the circumstances, it was urged that no interference was called for in the order of the Tribunal.

8. Article XIV reads as under:

"ARTICLE XIV - (1) Subject to Article XII, profits or remuneration from professional services or from services as an employee derived by an individual who is a resident of one of the territories may be taxed in the other territory only if such services are rendered in that other territory.

(2) An individual who is a resident of Austria shall not be taxed in India on profits or remuneration referred

to in paragraph (1) if-

(a) he is temporarily present in India for a period or periods not exceeding in the aggregate 183 days during the relevant`previous year'.

(b) the services are rendered for or on behalf of a resident of Austria.

(c) the profits or remuneration are subject to Austrian tax, and

(d) the profits or remuneration are not deducted in computing the profits of an enterprise chargeable to Indian tax.

9. On a plain reading , Clause (1) provides that profits or remuneration from professional services or from services as an employee derived by an individual who is resident of Austria may be taxed in India only if such services are rendered in India. It is an admitted position before the authorities that the assessee, a resident of Austria has rendered services in India and thus, the authorities would be entitled to seek to fasten charge of tax under the Act qua the remuneration received for such services.

10. However, Clause (2) of Article XIV carves out an exception, in such circumstances, and lays down four conditions which are required to be fulfilled before an individual who is otherwise held to be liable to tax under the Act in India is not to be taxed in India. There is no dispute between the parties that the assessee fulfils conditions of sub-clause (a), (b) and (d) of Clause (2) of Article XIV. The only controversy between the parties is in relation to meaning to be assigned to sub-clause (c) which states that the profits or remuneration are subject to Austrian tax. On a plain reading, it becomes apparent that the condition does not stipulate actual payment of tax which has been insisted upon by the revenue authorities. All that the provision provides is that the individual should be liable to tax under the Austrian statute. In other words, the Austrian statute must be shown to be levying tax on such remuneration. Being liable to tax and being actually taxed are two different things, and in a given situation, it is always possible, that a person may be liable to tax under a statute, but may not be actually taxed by virtue of may be some other provision under the same statute. Therefore, the approach of the authorities below to treat

the liability to tax as being actually taxed is not warranted by the language of the provision.

11. The view taken by the Court accords with the enunciation made by the Honourable Apex Court in the case of Union of India and Another V. Azadi Bachao Andolan and Another (Supra), wherein in almost similar situation, it was stated, " In our view, the contention of the respondents proceeds on the fallacious premise that the liability to taxation is the same as payment of tax. Liability to tax is a legal situation; payment of tax is a fiscal fact." The Court further takes into consideration the Model Tax Convention of 1992 and reproduces Article 4.1 which reads as under:

"It seems clear that a person does not have to be actually paying tax to be `liable to tax'- otherwise a person who had deductible losses or allowances, which reduced his tax bill to zero would find himself unable to enjoy the benefits of the convention. It also seems clear that a person who would otherwise be subject to comprehensive taxing but who enjoys a specific exemption from tax is nevertheless liable to tax, if the exemption were repealed, or the person no longer qualified for the exemption, the person would be liable to comprehensive taxation."

12. Therefore, the view taken by the authorities below that unless and until the assessee produces proof for payment of tax, he would not be entitled to claim relief under the agreement does not accord with the terms of the agreement and the language employed in Article XIV (2)(c) of the agreement. In fact, the Tribunal did observe on these lines but did not insist thereafter for applying the Austrian law when it observed that if India was to give up its right to tax for the income earned in India, it had to be satisfied that the assessee was liable to pay tax in respect of that income in the foreign country with whom the agreement was concluded.

13. In the circumstances, it is necessary that the provisions of the Austrian statute are brought on record and the parties get an opportunity to make their submissions thereon. As the applicant assessee is claiming benefit under an exception (exemption) provision, it will be upon the assessee to discharge the onus to show that it is subject to Austrian tax. It will be open to the assessee to rely upon provisions of the Austrian tax statute as well as any other evidence that the assessee may choose to bring on record and the Tribunal shall after taking the same into consideration

decide the issue between the parties. In light of what is stated hereinbefore, it is not necessary to answer the questions referred to us for the opinion, and we decline to answer the same leaving the parties to adduce whatever necessary evidence they may choose to place on record, and direct the Tribunal to decide the issue in accordance with law after taking into consideration further evidence that may be adduced by the parties. The Reference stands disposed of accordingly. There shall be no order as to costs.

(D.A.Mehta,J.)

(Ms.H.N.Devani,J)

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